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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD LEVI AVALOS, Defendant and Appellant.	E065166 (Super.Ct.No. FSB1304213) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Edward Levi Avalos appeals from an order denying his request to strike the punishment for a prior prison term, on the grounds that the underlying conviction was reduced to a misdemeanor under Penal Code section 1170.18.[1] We affirm the order.

PROCEDURAL BACKGROUND

Defendant was charged by felony complaint with second degree robbery (§ 211, count 1) and assault with a deadly weapon (§ 245, subd. (a)(1), count 2). The information also alleged that defendant had one prior strike conviction (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)) and had served five prior prison terms (§ 667.5, subd. (b)). On October 10, 2013, a trial court orally added a charge of assault by means likely to cause great bodily injury. (§ 245, subd. (a)(4), count 3.) Defendant pled no contest to count 3 and admitted the truth of one prison prior term (§ 667.5, subd. (b)) that arose from a grand theft conviction (§ 487, subd. (c)) in case No. FSB045865. The court sentenced defendant to a term of three years on count 3, plus one year on the prison prior, for a total of four years in state prison. Defendant did not appeal his conviction or sentence.

On February 5, 2015, defendant filed a petition for recall of sentence, pursuant to Proposition 47, in propria persona. The court denied the petition since his current conviction did not qualify for relief under Proposition 47.

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

Thereafter, on July 13, 2015, the court granted a Proposition 47 petition with regard to the grand theft conviction in case No. FSB045865, which was the conviction underlying the prior prison enhancement. The court reduced the conviction to a misdemeanor by stipulation of the parties.

On December 7, 2015, defendant filed a motion for resentencing in the current case under Proposition 47, on the ground that the conviction underlying the prison prior had been reduced to a misdemeanor. He argued that because the prior conviction was redesignated as a misdemeanor, the court was required to strike the section 667.5, subdivision (b) enhancement and reduce his current sentence by one year. The court concluded that Proposition 47 did not affect the prison prior enhancement.

ANALYSIS

The Court Properly Denied the Motion for Resentencing

Defendant contends that the trial court erroneously denied his motion to strike the prison prior enhancement (§ 667.5, subd. (b)) and reduce his sentence, since the felony conviction underlying the prison prior was reduced to a misdemeanor.[2] We disagree because Proposition 47 does not allow the striking of an enhancement of a sentence that is subject to a final judgment.

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[2] We acknowledge that this issue is currently under review by the California Supreme Court in *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011, and *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.

Defendant successfully applied for redesignation of his prior grand theft conviction (§ 487, subd. (c)), under section 1170.18, subdivision (f), which is explicitly retroactive. It provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application . . . to have the felony conviction or convictions designated as misdemeanors." Section 1170.18, subdivision (g), provides: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." Thus, the trial court correctly designated defendant's prior conviction a misdemeanor on a retroactive basis.

Defendant contends the trial court erred by refusing to treat his redesignated conviction as a misdemeanor for the purpose of striking the prior prison enhancement based on that conviction in the current case. However, this court recently held "section 1170.18, subdivisions (a), (b), (f), and (g) explicitly allow offenders to request and courts to grant retroactive designation of offenses such as [defendant's] prison prior, but no provision allows offenders to request or courts to order retroactively striking or otherwise altering an enhancement based on such a redesignated prior offense." (*People v. Jones* (2016) 1 Cal.App.5th 221, 230, review granted Sept. 14, 2016, S235901 (*Jones*).) We find no reason to depart from our prior holding.

Defendant contends section 1170.18, subdivision (k), provides that a felony conviction that has been redesignated as a misdemeanor pursuant to Proposition 47 must be treated as a misdemeanor "for all purposes" (with specified exceptions). Thus, he

contends section 1170.18, subdivision (k), requires retroactive application of Proposition 47 to allow the striking of past sentence enhancements based on felony convictions that were subsequently redesignated misdemeanors. This court considered and rejected the same argument in *Jones*, concluding "the direction of section 1170.18, subdivision (k) that any redesignated conviction 'shall be considered a misdemeanor for all purposes,' applies, at most, prospectively to preclude future or non-final sentence enhancements based on felony convictions redesignated as misdemeanors under Proposition 47." (*Jones, supra*, 1 Cal.App.5th at p. 230.) Again, defendant has provided no reason to depart from the holding in *Jones*.

Defendant further contends the voters intended Proposition 47 to have retroactive effect. He cites language from Proposition 47's ballot pamphlet that states its purposes are "'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention . . . .'" However, the language of section 1170.18 is clear and unambiguous, and it does *not* provide for the striking of a sentence enhancement imposed in a pre-Act final judgment, based on an underlying felony conviction subsequently redesignated a misdemeanor under section 1170.18. Therefore, we need not, and do not, rely on evidence of voter intent to construe section 1170.18's language. (*People v. Johnson* (2013) 57 Cal.4th 250, 260 [""'If the language is unambiguous, the plain meaning controls.'""].) In any event, even if we were to consider such evidence, defendant does not cite any evidence showing the voters intended any provisions of the Act to apply retroactively to allow the type of relief he seeks. Rather,

the evidence of voter intent supports, at most, prospective application of the Act to preclude future or nonfinal sentence enhancements based on a prior felony conviction redesignated as a misdemeanor under section 1170.18. If, as defendant asserts, the voters had intended the Act's provisions to apply retroactively to allow the striking of a prior prison enhancement, we presume the Act would have expressly so provided. (§ 3 ["No part of [the Penal Code] is retroactive, unless expressly so declared."].)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

SLOUGH
J.